PERUSAHAAN OTOMOBIL KEDUA SDN BHD

v.

KETUA PENGARAH KESATUAN SEKERJA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R3-25-43-1999]
16 NOVEMBER 1999

LABOUR LAW: *Trade union - Rules and constitution - Amendment - Scope of membership of subsidiary company to include employees of holding company - Whether contrary to s. 26(1A) Trade Unions Act 1959 - Whether subsidiary company and holding company separate and distinct legal entities - Whether by virtue of amendment an in-house union created in applicant company - Whether Part III of Trade Unions Act 1959 should be complied with for formation of in-house union in applicant company*

This was an application by the applicant company for an order of *certiorari* to quash the decision of the 1st respondent, the Director General of Trade Unions, under s. 34 of the Trade Unions Act 1959 ('the Act'). The 1st respondent had allowed the application of the 2nd respondent, the trade union of a subsidiary of the applicant company ('subsidiary company') to amend r. 3 of its constitution which extended the scope of representation/membership of the 2nd respondent to include employees of the applicant company.

Held:

[1] By virtue of s. 2(1) of the Act, the 2nd respondent was a union registered to represent employees in an establishment, *ie*, the subsidiary company. The scope of its membership was confined to the employees in the subsidiary company. The 2nd respondent could recruit and represent the employees of the subsidiary company only and not that of the applicant company.

[1a] The term "establishment" in s. 2(1) of the Act has a narrow meaning. It does not include subsidiary companies. It can only extend to employees in divisions or branches of the establishment company. The subsidiary company herein was not a branch or division of the applicant company. Although it was a wholly owned subsidiary of the applicant company, it was a distinct and separate legal entity. Thus, the 1st respondent erred in law and failed to consider that the subsidiary company and the applicant company were separate and distinct legal entities.

[2] A union registered to cater for one establishment cannot grow out of itself to represent employees in another establishment, being a separate legal entity [*Minister of Labour and Manpower v. Paterson Candy (Malaysia) Sdn Bhd*].

[3] The 1st respondent in making the said decision committed an error of law and thereby exceeded his jurisdiction when he failed to take into account the relevant consideration that the 2nd respondent being registered as an in-house union for the subsidiary company was thereby confined to serving the cause of the said employees within and not those of the applicant company and its subsidiaries.

[4] Section 26(1A) of the Act specifically prohibits the 2nd respondent from recruiting members or retaining members if the said members were not employed or engaged in the establishment in which it was registered. Rule 3 of the 2nd respondent clearly limited the scope of its membership to the employees in the subsidiary company. Thus, the 1st respondent could not extend the scope of membership of the 2nd respondent in contravention of s. 26(1A) of the Act by amending r. 3 of the 2nd respondent.

[5] The 1st respondent in making the said decision committed an error of law and thereby exceeded his jurisdiction by failing to take into account that for an in-house union to be formed in the applicant company, the correct procedure would be to register the same under Part III of the Act. This was because by virtue of the amendment, an in-house union was created in the applicant company where none existed before.

[5a] The employees of the applicant company should have complied with Part III of the Act if they wished to form an in-house union but this was not done. Therefore, the amendment to the scope of membership of the 2nd respondent by which a trade union had come to exist in the applicant company was a clear contravention of the relevant provisions of the Act in relation to registration of unions.

[6] The 1st respondent's decision to approve and register the amendment to the scope of membership of the 2nd respondent's rules without considering the relevant provisions of the said Act was a serious error of law inviting judicial review of the said decision.

[Application allowed in terms of (i), (ii) and (iv) of application.]

Case(s) referred to:

Harris Advanced Technology (M) Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor (M) [1999] 7 CLJ 153 ***(refd)***

Minister of Labour and Manpower v. Paterson Candy (Malaysia) Sdn Bhd [1980] 2 MLJ 122 ***(refd)***

Paterson Candy (Malaysia) Sdn. Bhd. v. The Honourable Minister of Labour and Manpower & 2 Ors O.M. No. 87 of 1977 ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 ***(refd)***

Legislation referred to:

Trade Unions Act 1959, ss. 2(1), 26(1A), 34, Part III

For the applicant - A Ramadass; M/s Ramadass & Assocs
For the 1st respondent - Loke Yee Ching, FC
For the 2nd respondent - Kamarul Hisham; M/s Daim & Gamany

Reported by Usha Thiagarajah

JUDGMENT

Faiza Tamby Chik J:

This application by the Perusahaan Otomobil Kedua Sdn. Bhd. ("the applicant") is for an order of *certiorari* to quash the decision of the Director General of Trade Unions ("first respondent") dated 5 March 1999 under s. 34 of the Trade Unions Act 1959 ("the Act").

The applicant is a private limited company having its registered place of business at Lot 1896, Sungai Choh, Mukim Serendah, Locked bag No. 226, 48009 Rawang, Selangor. The applicant company is the holding company of the subsidiary company *ie*, Perodua Manufacturing Sdn. Bhd. (hereinafter referred to as "the subsidiary company"). The second respondent is an establishment in-house union for the subsidiary company and scope of membership is confined to the employees employed by the subsidiary company. The second respondent had made an application to the first respondent to amend its constitution. The application to amend r. 3 of the second respondent is in respect of the scope of membership of the second respondent. The application to amend r. 3 of the second respondent's constitution was to extend the second respondent's scope of representation to include employees of the applicant company.

The first respondent had on 5 March 1999 made his decision to allow the second respondent's application to amend the constitution. (See exh. "PO-1") This had the effect of allowing the enlargement of the scope of membership of the second respondent to represent the employees of the applicant company, a separate legal entity and is in contravention of the relevant provisions of the Trade Unions Act 1959.

The law on judicial review is quite settled and is well explained in the case of *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 MLJ 317 where the Court of Appeal has clearly set out the principle governing judicial review which is stated on p. 342 as follows:

> In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure (see *Raja Abdul Malek Musaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

The first respondent in making the decision dated 5 March 1999, failed to take into account the relevant consideration, that by permitting the second respondent, an establishment in-house union of Perodua Manufacturing Sdn. Bhd., to amend its constitution to extend its scope of representation under s. 26(1A) of the Trade Unions Act 1959 had in effect permitted an in-house union to be formed in the applicant company through the wrong provisions of the said Act, thereby committing an error of law in excess of his jurisdiction. Under s. 2(1) of the Trade Unions Act 1959, a trade union can only be registered based on an establishment or trade or occupation or industry. Section 2(1) of the Trade Unions Act 1959, specifically defines a trade union as:

> Any association or combination of workmen or employers, being workmen whose place of work is in West Malaysia, Sabah or Sarawak, as the case may be, or employers employing workmen in West Malaysia, Sabah or Sarawak, as the case may be –
>
> (a) within any particular establishment, trade, occupation or industry or within similar trades, occupations, industries;

Section 2(1) of the Trade Unions Act 1959 defines 'establishment' as "any place of business or employment belonging to an employer and includes any division or branch thereof".

In *Harris Advanced Technology (M) Sdn. Bhd. v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor (M)* [1999] 7 CLJ 153, Abdul Kadir Sulaiman J said at pp. 161 - 162:

> ... Eusoff Chin J. (as he then was) in the above-cited originating summons No. R8-24-38-1990 has clearly said this as reproduced by the Court of Appeal at p. 3564:
>
> > I note that w.e.f. 10.2.89 by Act A717, the Trade Union Act 1957 had been amended to enable a trade union to be formed within any particular establishment (see definition of 'trade union' in s. 2 of the Trade Union Act).
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> The word 'establishment' in s. 2 has been defined to mean:
>
> > any place of business or employment belonging to an employer, and includes any division or branch thereof.
>
> From this it would appear that the plaintiff being a union of workmen who are employed by the 1st defendant, should confine itself to serving the cause of employees of the 1st defendant, and should carry out its union activities within the premises of the 1st defendant only.
>
> The plaintiff alleged that both defendants are not separate establishments since Abdullah is the same human resources manager for both defendants.
>
> I find that the two defendants may be in the same group *ie*, Harris Corporation, but they are different companies, having different places of business. The word 'establishment' as defined, has a wide meaning so that if, for example a company has different places of business or employment, and has branches all over the country, or has various divisions, employees working in each place of business, branch or division may get together to form a trade union. The activities of such union, however, are confined to such place, branch or division. As such, the activities of the plaintiff including recruitment of members, should only be confined to the establishment and the employees of the 1st defendant.

It could thus be seen that from the definition, the term "establishment", the second respondent is a union registered to represent employees in an establishment *ie*, Perodua Manufacturing Sdn. Bhd. ("the said subsidiary"). The scope of representation of the second respondent is confined to representing the employees employed by the said subsidiary only which is a subsidiary

company of the applicant company. Therefore the second respondent can recruit and represent the employees of the said subsidiary only and cannot represent the employees employed by the applicant company. The applicant company and the said subsidiary are two distinct and separate establishments. With the decision of the first respondent in amending the r. 3 of the second respondent, the first respondent had committed an error of law and exceeded his jurisdiction when he allowed the second respondent to enlarge the scope of representation to represent the employees of the applicant company, in contravention of s. 26(1A) of the Trade Unions Act 1959.

In the case of *Minister of Labour and Manpower v. Paterson Candy (Malaysia) Sdn. Bhd.* [1980] 2 MLJ 122 FC, Chang Min Tat FJ said at p. 123:

> Section 2(a) of the Ordinance gives the following definition of a trade union, omitting words not relevant to this appeal:
>
> > 'trade union' or 'union' means any association or combination of workmen or employees, being workmen or employees ...
> >
> > (a) within any particular trade, occupation or industry or within any similar trades, occupations or industries, and ...
>
> By this definition, no trade union can grow out of itself. It must be an association, put shortly, of workmen in similar trades, occupations or industries.

The definition of "trade union" or "union" have been amended effective from 10 February 1989 by inserting the words "establishment" in the definition of "trade union". Therefore, a trade union can only be formed based on the definition of the trade union as provided for in s. 2(1) of the said Act. Following the decision in the *Paterson Candy* case above, it is obvious that a union registered to cater for one establishment cannot grow out of itself to represent employees in another establishment, being a separate legal entity. Furthermore, s. 26(1A) of the Trade Unions Act 1959, provides specifically that "No person shall join, or be a member of, or be accepted or retained as a member by, any trade union if he is not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered".

This section is a prohibitory section and strictly prohibits an establishment of union, like the second respondent from representing employees in another establishment like the subsidiary company *ie*, Perodua Manufacturing Sdn. Bhd.

The first respondent in making the said decision failed to take into account the relevant consideration that the applicant company and its subsidiaries are separate and distinct entities from the said subsidiaries for the purpose of the said Act, thereby committing an error of law in excess of his jurisdiction. The

scope of membership of the second respondent, as defined by r. 3 of its constitution, which before the amendment are as follows:

> Keanggotaan Kesatuan ini terbuka kepada pekerja-pekerja yang digaji oleh Perodua Manufacturing Sdn. Bhd. kecuali mereka yang memegang jawatan pengurusan, eksekutif, sulit atau keselamatan.

After the first respondent approved the amendment, the membership scope of the second respondent under r. 3 read as follows:

> Keanggotaan Kesatuan ini terbuka kepada pekerja-pekerja yang digaji oleh Perusahaan Otomobil Kedua Sdn. Bhd. dan anak-anak syarikat milik penuhnya kecuali mereka yang digaji dalam jawatan pengurusan, ekesekutif, sulit atau keselamatan dan mereka yang digaji oleh Perodua Sales Sdn. Bhd.

It is clear that the second respondent's application to amend its scope of representation was to enlarge the scope of representation from not only representing the employees in Perodua Manufacturing Sdn. Bhd. for which it was originally registered but also the employees of the applicant company and the employees in the wholly owned subsidiaries of the applicant company, including of course any other wholly owned subsidiaries to be formed in the future. Although the applicant company and the Perodua Manufacturing Sdn. Bhd. are within the same group of companies *ie*, Perusahaan Otomobil Kedua Sdn. Bhd., the applicant company and Perodua Manufacturing Sdn. Bhd. are two separate distinct entities. The effect of approving the amendment by the first respondent is that it has created an in-house union in the applicant company, whereby no in-house union existed in the applicant company before the amendment.

A similar application like the present application was made in *Harris Advanced (M) Sdn. Bhd. v. Ketua Pengarah Kesatuan Sekerja & Anor* [1999] 7 CLJ 153 in the High Court of Malaya at Kuala Lumpur. In that case, Kesatuan Pekerja-Pekerja Haris Solid-State (M) Sdn. Bhd. (KPPHSSM) an in-house establishment union represented the employees of the Harris Solid State (M) Sdn. Bhd. (HSSM). An application by that union to amend its name to Kesatuan Pekerja-Pekerja Harris Advanced Technology (M) Sdn. Bhd. (KPPHAT), to enable it to represent the employees in Harris Advanced Technology (HAT), a separate legal entity was made under s. 34 of the Trade Unions Act 1959 and the said application was approved by the Director General of Trade Unions. In quashing the decision of the Ketua Pengarah Kesatuan in that case Kadir Sulaiman J made the following observations:

> In fact the Court of Appeal agreed with the decision of Eusoff Chin J (as he then was) in originating summons No. R8-24-38-1990 that for the purpose of the 1959 Act as amended by Act A717 the subsidiaries within the Harris Group

a are separate entities. Therefore, KPPHSSM being an in-house union in HSSM should confine itself to serving the cause of employees of HSSM and should carry out its union activities within the premises of HSSM only.

The matter of this application before me now relates to a matter within the confine of the 1959 Act and not one under the 1967 Act. In the circumstances, b the principle enunciated by Eusoff Chin J. (as he then was) should be in the forefront of our mind *ie*, that HSSM and HAT are two separate entities. The union activities in HSSM cannot involve the workers in HAT, the union being an in-house union.

The first respondent in making the said decision failed to take into account c the relevant consideration and misconstrued the definition of "establishment" under s. 2 of the said Act, thereby committing an error of law in excess of his jurisdiction. Section 2(1) of the Trade Unions Act defines establishment as "any place of business or employment belonging to an employer, and includes any division or branch thereof". The said subsidiary and the applicant d company are distinct and separate "establishment". The first respondent had erred in law and failed to consider that the said subsidiary and the applicant company are separate and distinct legal entities. Although the said subsidiary is a wholly owned subsidiary of the applicant company it is a separate and distinct legal entity. The contravention by the second respondent in the affidavit e affirmed by Encik Mohd. Rozlan and Encik Mohd. Khir on 6 August 1999 at para. 10 have no relevance to the question of determining the scope of representation of the second respondent. The term establishment as defined, has a narrow meaning. It cannot include subsidiaries companies. It can only extend to employees employed in divisions or branches of the establishment f company. In *Harris Advanced Technology (M) Sdn. Bhd. v. Ketua Pengarah Kesatuan Sekerja & Anor* [1999] 7 CLJ 153, Kadir Sulaiman J said as quoted earlier at p. 162:

The word 'establishment' as defined, has a wide meaning so that if, for example a company has different places of business or employment, and has branches g all over the country, or has various divisions, employees working in each place of business, branch or division may get together to form a trade union. The activities of such union, however, are confined to such place, branch or division. As such, the activities of the plaintiff including recruitment of the members, should only be confined to the establishment and the employees of the 1st defendant.

h In the instant application it is obvious that the said subsidiary is not a branch or division of the applicant company. The said subsidiary and the applicant company are distinct and separate entities. Therefore, the second respondent's scope of representation is limited to the employees of the said subsidiary only

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and cannot represent or enlarge the membership under s. 34 of the said Act to represent the employees of the applicant company and the first respondent has no discretion to extend the scope of the second respondent's scope of representations, as contended by the second respondent at para. 11(i) of the said affidavit in reply.

The first respondent in making the said decision committed an error of law and thereby exceeded his jurisdiction when he failed to take into account the relevant consideration that the second respondent being registered as in-house union for the subsidiary company is thereby confined to serving the cause of the said employees of the said subsidiary company and carrying out its activities within the premises of the said original company as envisaged by s. 26(1A) of the said Act and not be extended to doing the same for that of the applicant company and its subsidiaries. Section 26(1A) of the Trade Unions Act 1959 states that "No person shall join or be a member of, or be accepted or retained as a member by, any trade union if he is not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered". In determining, whether a person or group of workmen can join or be a member of the particular trade union, the scope of membership is an important fact. Section 26(1A) of the said Act specifically prohibits the second respondent from recruiting members or retaining membership, if the said members are not employed or engaged in the establishment in respect of which the trade union is registered. Rule 3 of the second respondent clearly limits the scope of the representation of the second respondent to the employees employed in the said subsidiary only. The first respondent cannot thus extend the scope of the representation of the second respondent in contravention of s. 26(1A) of the Act. The first respondent has therefore contravened s. 26(1A) of the Act by amending the r. 3 of the second respondent thereby extending the scope of representation of the second respondent.

The first respondent in making the said decision committed an error of law and thereby exceeded his jurisdiction by failing to take into account that for an in-house union to be formed in the applicant company, the correct procedure would be to register the same under Part III of the said Act. With the enlargement of the second respondent's scope of representation, in-house union was allowed to be created within the applicant company. Prior to the first respondent's approval to the amendment, no in-house union existed in the applicant company. The first respondent by approving the amendment to the second respondent's constitution by virtue of s. 34 of the said Act had created a trade union by way of the "back door". If the employees of the applicant

company wish to form an in-house union, the proper procedure is to comply with Part III of the said Act. This was not done. Therefore, the amendment to the scope membership of the second respondent by which a trade union had come to exist in the applicant company is a clear contravention of the relevant provisions of the said Act, in relation to registration of unions. In *Harris Advanced Technology (M) Sdn. Bhd. v. Ketua Pengarah Kesatuan Sekerja & Anor.* O.M. No. R1-25-45-97, Abdul Kadir Sulaiman J in quashing the decision of the Ketua Pengarah Kesatuan has further observed as follows:

> It is clear, therefore, that the intention of KPPHSSM and the First Respondent was to have a union representing workers in HAT, where there was none before, on the ground that the workers of HSSM were now in HAT. Little did the First Respondent realise that by his act, a new in-house union in HAT has been established, where there was none before which according to the decision of Eusoff Chin J. (as he then was) that for the purposes of the 1959 Act as amended, HSSM and HAT are separate entities and the in-house union in HSSM has no right to meddle with the affairs of the workers in HAT. KPPHSSM must confine its activities only within HSSM. If indeed there ought to be an in-house union in HAT a proper procedure under Part III of the 1959 Act must be taken *ie*, going through the process of registering the intended new in-house union in HAT. There is no shortcut to it. For the union the action of the First Respondent was a welcoming exercise indeed but for HAT it is a clear violation of the rules of law against it. There is no consolation to HAT in the First Respondent saying that HAT should accept what he has done and to deny recognition of KPPHAT which could be resolved by him in a separate exercise.

The first respondent, in making the decision to allow the amendment of the second respondent's scope of representation failed to take into account relevant consideration *ie*, the provision in s. 26(1A) of the Trade Unions Act 1959. In the case of *Paterson Candy (Malaysia) Sdn. Bhd. v. The Honourable Minister of Labour and Manpower & 2 Ors.* O.M. No. 87 of 1977 in the High Court of Malaya at Kuala Lumpur, Harun M Hashim J said:

> the Trade Unions Ordinance 1959 provide, *inter alia*, that every trade union shall be registered (section 8) apart from certain restrictions regarding membership of minors and students, the membership of trade union shall be in accordance with the rule of that union (section 26) which, however, is subject to s. 2(1) of the Trade Union Ordinance.

Section 26(1A) states:

> No person shall join, or be a member of, or be accepted or retained as a member by, any trade union if he is not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered.

The first respondent had committed an error of law and acted beyond jurisdiction when in making his decision allowing the amendment of the second respondent's scope of representation failed to take into account relevant consideration the provision in s. 26(1A) of the said Act. The membership scope of the in-house union must be based on an establishment only. Therefore the second respondent's representation is limited to the representation of employees of the said subsidiary only and not enlarging its scope of representation outside the establishment of the said subsidiary. Therefore, the first respondent had committed an error of law and had acted beyond his jurisdiction. The first respondent's decision to approve and register the amendment to the scope of representation of the second respondent's Rules without considering the relevant provisions of the said Act is a serious error of law inviting this court to conduct the judicial review to quash the said decision.

For the above reasons I hereby order in terms of (i), (ii) and (iv) of the application.